

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GOODMAN BALL, INC.,)	
)	
Plaintiff(s),)	No. C07-1148 BZ
)	
v.)	ORDER GRANTING IN PART
)	DEFENDANTS' MOTION TO
CLEAR WATER USA, INC., et)	DISMISS
al.,)	
)	
Defendant(s).)	
_____)	

Before the court are the motions¹ of defendants Clear Water USA, Inc. (Clear Water), Denouement Strategies, Inc. (Denouement), Escape Velocity of Tampa Bay, Inc. (Escape Velocity) and SolarDiesel Corporation (SolarDiesel) to dismiss the amended complaint for lack of personal jurisdiction, or in the alternative, to transfer venue.² Defendant Mach II

¹ After Clear Water and Denouement moved to dismiss, I granted plaintiff's request for jurisdictional discovery. Following discovery, plaintiff filed a first amended complaint which added three additional defendants, two of whom, Escape Velocity and SolarDiesel, then moved to dismiss.

² No defendant currently seeks dismissal for improper venue.

1 Aviation, Inc. (Mach II) acknowledged personal jurisdiction
2 but joined in the request to transfer venue pursuant to 28
3 U.S.C. § 1404(a).³

4 The first amended complaint accuses Mach II and the
5 moving defendants of infringing plaintiff's patents.
6 Specifically, plaintiff alleges that defendants manufactured,
7 sold, imported and distributed in California, water
8 purification systems (the accused systems) that infringed
9 plaintiff's patented water purification and power generation
10 technology.

11 For purposes of these motions, the essence of plaintiff's
12 amended complaint is that non-moving defendant Mach II
13 contracted with Defense Supply Center Philadelphia to sell the
14 accused systems to the government and deliver them to the U.S.
15 Navy in Port Hueneme, California⁴ and Gulfport, Mississippi.
16 Mach II in turn entered into an agreement with Acqua America,
17 Inc. (Acqua) for Acqua's affiliate to manufacture the units.
18 Escape Velocity is charged with providing financing Mach II
19 needed to purchase the accused systems. Denouement, Clear
20 Water and SolarDiesel are charged with having played other
21 roles in the distribution of the accused systems.

22 It appears from the record that all defendants were
23 operated, at all relevant times, by two individuals, Walter
24 Holmich and John Stanton. Mr. Holmich is president of Clear

25 ³ All parties have consented to my jurisdiction for all
26 proceedings, including entry of final judgment, pursuant to 28
27 U.S.C. § 636(c).

28 ⁴ Eighteen of the systems were shipped to Port Hueneme,
California.

1 Water, a Florida corporation. Mr. Holmich was also the
2 president of Mach II, a Florida corporation, until it was
3 dissolved. Escape Velocity and Denouement are Florida
4 corporations owned by Mr. Stanton. SolarDiesel is a wholly
5 owned subsidiary of EarthFirst Technologies, Inc. Mr. Stanton
6 is chairman of EarthFirst Technologies, Inc. Mr. Stanton and
7 Mr. Holmich are friends.

8 The parties agree that because the personal jurisdiction
9 inquiry in this case is intimately intertwined with the
10 substance of the patent laws, the law of the Federal Circuit
11 applies. The Federal Circuit and the Ninth Circuit agree that
12 "where the district court's disposition as to the personal
13 jurisdictional question is based on affidavits and other
14 written materials in the absence of an evidentiary hearing, a
15 plaintiff need only to make a *prima facie* showing that
16 defendants are subject to personal jurisdiction." Electronics
17 for Imaging, Inc. v. Coyle, 340 F.3d 1344, 1349 (Fed. Cir.
18 2003); see also Deprenyl Animal Health, Inc. V. University of
19 Toronto Innovations Found., 297 F.3d 1343, 1347 (Fed. Cir.
20 2002); American Tel. & Tel. Co. v. Compagnie Bruxelles
21 Lambert, 94 F.3d 586, 589 (9th Cir. 1996). "In the procedural
22 posture of a motion to dismiss, a district court must accept
23 the uncontroverted allegations in the plaintiff's complaint as
24 true and resolve any factual conflicts in the affidavits in
25 the plaintiff's favor." Electronics for Imaging, Inc., 340
26 F.3d at 1349.

27 The parties agree that California's long arm statute,
28 California Code of Civil Procedure § 410.10, allows the

1 exercise of personal jurisdiction on any basis provided under
 2 the federal constitution. A court may have either "general"
 3 or "specific" jurisdiction over a party. General jurisdiction
 4 lies where the defendant has "continuous and systematic
 5 contacts" with the forum state. Electronics for Imaging,
 6 Inc., 340 F.3d at 1349. Plaintiff does not contend that this
 7 court has general jurisdiction over any party. Specific
 8 jurisdiction lies where the cause of action arises at least in
 9 part out of activities that defendant has purposefully
 10 directed toward the forum state and where the exercise of
 11 jurisdiction is otherwise reasonable. See LSI Industries Inc.
 12 v. Hubbell Lighting, Inc., 232 F.3d 1369, 1375 (Fed. Cir.
 13 2000); Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d
 14 1558, 1568 (Fed. Cir. 1994).

15 In part, plaintiff relies on a stream of commerce theory
 16 to support personal jurisdiction. Jurisdiction lies over a
 17 defendant that "delivers its products into the stream of
 18 commerce with the expectation that they will be purchased by
 19 consumers in the forum State." Beverly Hills Fan Co., 21 F.3d
 20 at 1565, (internal quotations omitted).⁵ Where the action for

21
 22 ⁵ In Asahi Metal Industry Co. v. Superior Court of
 23 California, 480 U.S. 102 (1987), the Supreme Court split over
 24 the degree and character of minimum contact required under the
 25 stream of commerce theory. See Beverly Hills Fan Co., 21 F.3d
 26 at 1566. Four justices concluded that a defendant that places
 27 products into a "regular and anticipated" stream of commerce
 28 and is aware that the product is or may be directed into the
 forum state is susceptible to jurisdiction. Four other
 justices, however, concluded that a showing of some "additional
 conduct" is required to satisfy due process. See Asahi Metal
Industry Co., 480 U.S. at 116-17 (Brennan, J., concurring in
 part); Beverly Hills Fan Co., 21 F.3d at 1556. The Federal
 Circuit has steadfastly refused to take a position as to which
 view it considers controlling. See, e.g., Kernius v. Int'l

1 patent infringement involves a product shipped into a state
2 through such an established distribution channel, the due
3 process requirement of "minimum contacts" with the state is
4 satisfied. *Id.* At 1565. The stream of commerce theory has
5 been applied to the sale and distribution of consumer products
6 sold on the retail market. *See id.* at 1566 - 67. Here, the
7 accused systems are large, specialized military equipment,
8 sold pursuant to a one-time military procurement which does
9 not rise to the level of an established distribution channel.
10 For these reasons, the Beverly Hills Fan Co. stream of
11 commerce theory is not by itself sufficient to sustain
12 jurisdiction over all defendants.

13 **ESCAPE VELOCITY**

14 Plaintiff has established *prima facie* that Escape
15 Velocity has sufficient contacts with California to exercise
16 "specific jurisdiction" over it. Viewing the factual
17 conflicts in plaintiff's favor, *see Electronics for Imaging,*
18 *Inc.*, 340 F.3d at 1349, Escape Velocity's provision of
19 financing to allow Mach II to acquire the accused systems,
20 eighteen of which were sent to Point Hueneme, California,
21 demonstrate its crucial role in the manufacture and sale of
22 some or all of the accused systems and their delivery to
23 California. Put another way, it appears from the record that
24 had Escape Velocity not paid Aqua, at least some of the
25 accused systems either would not have been manufactured or
26

27 Electronics, Inc., 433 F. Supp. 2d 621, 625 (D. Md. 2006)
28 (discussing Federal Circuit cases). The resolution of these
motions does not require me to resolve the question.

1 would not have been sold to Mach II and delivered to
2 California. Providing financing for systems which it knew
3 were going to be delivered to California is an activity of
4 Escape Velocity purposefully directed towards California such
5 that it is reasonable to exercise jurisdiction over it with
6 respect to a claim that the accused systems infringe
7 plaintiff's patents. See Hanson v. Denckla, 357 U.S. 235,
8 253-4 (1958); Beverly Hills Fan Co., 21 F.3d at 1566.

9 Exercising jurisdiction over Escape Velocity also
10 comports with concepts of "fair play and substantial justice."
11 Burger King Corp. V. Rudzewicz, 471 U.S. 462,
12 477 - 8 (1985). Balancing the factors for determining
13 reasonableness, jurisdiction over Escape Velocity in
14 California is reasonable. See Terracom v. Valley Nat'l Bank,
15 49 F.3d 555, 561 (9th Cir. 1995). The accused systems were
16 delivered to California, and plaintiff is located in
17 California. California has a significant interest "in
18 discouraging injuries that occur within the state" and to its
19 citizens. See Electronics for Imaging, Inc., 340 F.3d at 1351
20 - 52. The burden of requiring Escape Velocity to defend this
21 suit in California is minimal since it shares counsel with
22 Mach II and since many witnesses are located in California.
23 The accused systems, and the Navy personnel who use them, are
24 located in Port Hueneme, California. Plaintiff's witnesses
25 are in the Bay Area. Accordingly, Escape Velocity's motion to
26 dismiss for lack of personal jurisdiction pursuant to Federal
27 Rule of Civil Procedure 12(b)(2) is **DENIED**.

CLEAR WATER

Plaintiff has failed to make a *prima facie* showing of specific jurisdiction over Clear Water. Clear Water had almost no involvement with the sale or delivery of the accused systems to the Navy in Port Hueneme, California. While Clear Water was listed as the "place of performance" of the third purchase order between Mach II and the government its cancellation negates what little relationship Clear Water had to the accused systems.⁶ The use on one occasion of Clear Water letterhead to address a written complaint to Acqua regarding invoices for certain systems (Pl.'s Supl. Opp., Exh. 7) while troublesome, seems more of an anomaly than anything else. That letter was not sent to California.

It appears that, from at least December 2005 through December 2006, Clear Water maintained a website that advertised the accused systems to Californians. However, the passive website only displayed products for sale and allowed visitors to request further information; visitors could not place orders on the site. There is no evidence that the website specifically targeted Californians. "A passive website is insufficient to establish purposeful availment for the purpose of due process." Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997). Plaintiff has failed to provide *prima facie* evidence that its injuries arise out of Clear Water's contacts with California or that Clear

⁶ The "place of performance" is where government inspectors visit to inspect and accept the items to be shipped per the order. Mach II's business address and place of operations was the same as Clear Water's.

1 Water purposefully directed its contacts with California. See
2 Electronics for Imaging, Inc., 340 F.3d at 1350-1. As such,
3 Clear Water's motion to dismiss is **GRANTED**.

4 **DENOUEMENT**

5 Denouement's contacts with California also fail to give
6 rise to personal jurisdiction.⁷ Mach II provided Denouement
7 with twenty-two water purification units in satisfaction of a
8 debt owed Escape Velocity. It is undisputed that these
9 twenty-two units were transferred to SolarDiesel and are
10 currently in its possession in Florida. The record does not
11 disclose that these units are accused of infringement or that
12 they have ever been to California. Denouement's involvement
13 in accepting and transferring the twenty-two units that
14 remained in Florida do not link Denouement to California.

15 Denouement admits to having advertised water purification
16 units on its website at www.sdvo.net, formerly at www.sdvo.us.
17 There is no evidence that these units infringed. In contrast
18 to Clear Water's website, Denouement's included a link to the
19 "PayPal" service, through which customers could make payments
20 to Denouement via the internet. No customer, however, has
21 ever used the PayPal link on either Denouement's former or
22 current website. Indeed, no items are available for sale on
23 its current website. There is no evidence that the site's
24 content was in any way targeted to California. Given the
25 character of the website and Denouement's lack of connection
26

27 ⁷ Denouement has never maintained an address or place
28 of business in California, paid taxes in California, or brought
or defended a lawsuit in California.

1 to California, its maintenance of the site does not establish
2 sufficient minimum contacts. See, e.g., Trintec Indus., Inc.,
3 395 F.3d at 1281. Accordingly, Denouement's motion to dismiss
4 is **GRANTED**.

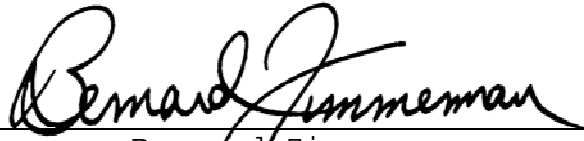
5 **SOLARDIESEL**

6 SolarDiesel is also a Florida corporation with which Mr.
7 Stanton is associated. SolarDiesel does not maintain a
8 website, does not maintain an office or place of business in
9 California, and has never maintained an address in California.
10 Although Mr. Stanton admits it wants to sell the twenty-two
11 systems in its possession, their purchase and storage do not
12 in any way connect SolarDiesel to California. As such,
13 plaintiff has not made a *prima facie* showing that SolarDiesel
14 has sufficient minimum contacts to California to establish
15 personal jurisdiction and SolarDiesel's motion to dismiss is
16 **GRANTED**.

17 Defendants also request that the suit be transferred
18 pursuant to 28 U.S.C. § 1404(a) to the Middle District of
19 Florida, which they contend is a more convenient forum. I
20 disagree that Florida would be a more convenient forum.
21 Defendants contend that the majority of witnesses would be
22 located in Florida. However, the inventors of the patented
23 technology, as well as witnesses regarding the design,
24 function, and operation of plaintiff's systems, are located in
25 California. The accused systems and the Navy personnel with
26 knowledge of them are located in California. As such, the
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1 motion to transfer venue is **DENIED**.⁸ Escape Velocity shall
2 answer the complaint by **November 15, 2007**.

3 Dated: October 31, 2007

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7 Bernard Zimmerman
United States Magistrate Judge
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28 ⁸ Escape Velocity and SolarDiesel's motion for leave to
file a late Reply is **GRANTED**, as unopposed.